APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DATED AND FILED AUGUST 26, 1999

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

STEPHEN A. SPOSATO, Administrator, ESTATE OF JODY JONES SPOSATO, *Plaintiff-Appellant,* v. ELECTRONIC DATA SYSTEMS, CORP., DAVID WIRE, *Defendants-Appellees.*	No. 98-16573 D.C. No. CV-92-03994-SC OPINION

Appeal from the United States District Court
for the Northern District of California
Samuel Conti, District Judge, Presiding

Submitted March 23, 1999[1]

Filed August 26, 1999

Before: Alfred T. Goodwin, Edward Leavy, and Sidney R. Thomas, Circuit Judges.

Opinion by Judge Goodwin;
Dissent by Judge Leavy

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[1]The panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34(a)(2).

Appendix A

SUMMARY

Labor and Employment/Insurance

The court of appeals reversed a judgment of the district court. The court held that under California law, when an employer is liable to a former employee for wrongful discharge under the Fair Employment and Housing Act (FEHA), part of the backpay and benefits package includes a life-insurance policy, and the employee dies during the backpay period, the proper measure of damages is the face value of the policy, less the proceeds from a substitute policy obtained by the employee in an effort to mitigate damages from the loss of employment benefits.

Jody Sposato sued appellee Electronic Data Systems Corporation (EDS) under California law for wrongful discharge. The parties engaged in settlement negotiations. During the pendency of the action before the district court, Sposato died in an accident, and her husband, appellant Stephen Sposato was substituted as plaintiff.

Under stipulated facts, the terms of the ensuing settlement agreement, and the FEHA, Jody Sposato was wrongfully discharged; EDS was liable for backpay, which included a life-insurance policy with a double indemnity provision; the backpay period began with her discharge and ended with her death; the policy would have been in effect when she died but for the wrongful discharge; and Ms. Sposato fully mitigated her damages by purchasing a substitute insurance policy that did not contain a double indemnity provision.

On behalf of his wife's estate, Stephen Sposato brought an action to obtain from EDS the face value of the life insurance policy that would have been in effect at the time of her death, but for her wrongful termination. EDS contended that the estate was entitled to only the value of the premiums that

would have been paid to provide the policy. The district court agreed with EDS. The estate appealed.

[1] Federal courts have considerable discretion to fashion remedies that provide the most complete relief possible to victims of workplace discrimination who bring an action against their employer under Title VII. California courts have adopted a similar approach in wrongful termination cases brought under state law.

[2] California courts would apply their traditionally broad remedial approach to this case. Accordingly, the proper measure of damages was the face value of the employer-provided life insurance policy that would have been in effect but for the wrongful termination, less any proceeds received by the estate from the payout on the substitute coverage. [3] The employer should bear the economic consequences of its choice to terminate Ms. Sposato's employment and her life-insurance policy.

[4] The California survival statute [5] provides that virtually all causes of action survive a decedent's death, but places limitations on the damages recoverable by a decedent's estate. For example, Cal. Civ. Proc. Code § 377.34 excludes damages not sustained or incurred by the decedent before death. However, surviving relatives may bring a wrongful death action under § 377.60 to recovery pecuniary losses caused by the death.

[6] Together, these provisions preclude double recovery for survivors in cases where the decedent's injury is both the foundation of the decedent's tort cause of action and the cause of the decedent's death. [7] California courts have interpreted § 377.34 to prohibit an award of speculative, personal or non-economic damages such as pain and suffering, emotional distress, and loss of future earnings.

[8] The facts of this case put Ms. Sposato's loss outside the category of losses prohibited by California's survival statute.

As a consequence of her unlawful termination, Ms. Sposato's employer wrongfully denied her a life-insurance policy containing a double indemnity provision. This loss predated her death. The benefit of the policy was never meant to inure to Ms. Sposato, but was always intended to benefit her family. The amount of the payout was certain throughout the course of the dispute with her employer. The damages were therefore not speculative or personal to the decedent, nor did the loss suffered by the decedent occur after her death.

Judge Leavy dissented, writing that the proper measure of damages was the value of the life insurance premiums.

COUNSEL

Edwin L. Currey, Bronson, Bronson & McKinnon, San Francisco, California, for the plaintiff-appellant.

Patricia M. Lucas, Fenwick & West, Palo Alto, California, for the defendants-appellees.

OPINION

GOODWIN, Circuit Judge:

This appeal presents a narrow question of California law: On stipulated facts, what is the proper measure of damages where an employer is liable to a former employee for wrongful termination under the state Fair Employment and Housing Act ("FEHA"), part of the back pay and benefits package includes a life insurance policy, and the employee is killed during the back pay period? We have jurisdiction under 28 U.S.C. § 1291, and hold that on the unusual facts of this case, the employer is liable for the face value of the employer-provided policy, less the proceeds received under the substi-

tute policy obtained by the employee in an effort to mitigate the damages caused by the loss of her employment benefits.

BACKGROUND

This action began in California state court in 1992 when Jody Sposato, who had been employed by Electronic Data Systems (EDS), sued her former employer for wrongful discharge under California law. The case was removed to federal court on diversity grounds, and the parties engaged in extensive settlement negotiations. During the pendency of the proceedings before the district court, Jody Sposato was accidentally killed and her husband was substituted as plaintiff. The bulk of the factual issues in this case were resolved by stipulation of the parties, but when the case came before this panel in 1997, we remanded the case to the district court to address a fact question not resolved by the stipulation. *See Sposato v. Electronic Data Sys., Corp.*, 1997 WL 196733 (9th Cir. 1997) (unpublished disposition).

With respect to the narrow issue now before this court, the relevant and undisputed facts are: (1) Jody Sposato was wrongfully terminated from her employment at EDS; (2) under the FEHA and the terms of the settlement agreement signed by the parties, EDS was liable to Ms. Sposato for back pay, which included a life insurance policy with a double indemnity provision; (3) the back pay period began with her employment termination and ended with her death; (4) the life insurance policy provided by EDS would have been in effect at the time of Ms. Sposato's death, but for her wrongful termination; (5) Ms. Sposato fully mitigated her damages by purchasing a substitute insurance policy, even though the policy she was then able to purchase did not include a double indemnity provision.

DISCUSSION

Ms. Sposato's estate brought this action seeking to obtain from EDS the face value of the life insurance policy that

would have been in effect at the time of Ms. Sposato's death, but for her wrongful termination. EDS, by contrast, contends that Ms. Sposato's estate is entitled only to the value of the premiums that would have been paid to provide the insurance policy. EDS advances two theories in support of its position, and we examine each in turn.

I. Proper Measure of Damages

[1] Federal courts have considerable discretion to fashion remedies that provide "the most complete relief possible" to victims of workplace discrimination who bring an action against their employer under Title VII. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 421 (1975) (noting that Title VII "is intended to make the victims of unlawful discrimination whole," and that the Act "requires that persons aggrieved by the consequences and effects of the unlawful employment practice be, so far as possible, restored to a position where they would have been were it not for the unlawful discrimination."); *Galindo v. Stoody Co.*, 793 F.2d 1502, 1517-18 (9th Cir. 1986) (noting that the cash equivalent of medical or life insurance premiums that would have been paid by an employer is not necessarily an accurate measure of plaintiff's damages). California courts have adopted a similar approach in wrongful termination cases brought under state law. *See, e.g., City and County of San Francisco v. Fair Employment and Housing Comm'n*, 191 Cal. App. 3d 976, 985 (Cal. Ct. App. 1987) (recognizing that the objectives and purposes of the FEHA and Title VII are identical, and observing that California courts have often turned to federal Title VII authority to interpret provisions of the FEHA); and *see generally DFEH v. Madera County*, FEHC Dec. No. 90-03 (1990); *DFEH v. Rayne Water Conditioning*, FEHC Dec. No. 84-01 (1984).

[2] Although the precise question at bar has not been addressed in this circuit or by the state courts, we believe that the California courts would apply their traditionally broad

remedial approach to the unusual facts of this case. Accordingly, the proper measure of Ms. Sposato's damages is the face value of the employer-provided life insurance policy that would have been in effect but for the wrongful termination, less any proceeds received by Ms. Sposato's estate from the pay-out on the substitute life insurance coverage.

Appellee's contention that *Fariss v. Lynchburg Foundry*, 769 F.2d 958 (4th Cir. 1985), should control here is unpersuasive. In *Fariss*, as in this case, the complainant brought a wrongful termination suit against his former employer but died during the pendency of the proceedings. *Id.* at 961. Mr. Fariss' wife was substituted as plaintiff, but the district court granted summary judgment in favor of the employer on the wrongful termination claim. *Id.* On appeal, a panel of the Fourth Circuit considered whether Mrs. Fariss would be able to recover any damages, assuming that she could prove that her husband had been wrongfully terminated. *Id.* at 963.

As in this case, Mrs. Fariss sought to recover the face value of an employer-provided life insurance policy that would have been in effect but for her husband's allegedly wrongful termination. *Id.* The court held that the "insurance coverage, not the proceeds, is the benefit for which the employer must be held liable," and that the proper measure of the Fariss' damages would be the amount of the premiums the employer would have paid had the termination not occurred. *Id.* at 965-66. However, the court stated that "[b]ecause there [was] no evidence here that Mr. Fariss attempted to obtain any substitute coverage, plaintiff can recover only the premiums the employer would have paid." *Id.* at 966.

[3] We believe that Fariss is inapposite here because, while the complainant in *Fariss* chose not to self-insure after his termination, the parties have stipulated in this case, pursuant to arbitration, that Ms. Sposato mitigated her damages fully by obtaining substitute life insurance coverage. The employer

should bear the economic consequences of its choice to terminate Ms. Sposato's employment and her life insurance policy.

II California's Survival Statute

EDS contends that Ms. Sposato's estate cannot recover the face value of the employer-provided life insurance policy because California law limits recovery in survival actions to "the loss or damage that the decedent sustained or incurred before death." Cal. Civ. Proc. Code § 377.34.[2] EDS would have this court deny Ms. Sposato's estate the relief set forth above because they contend that, during her life, Ms. Sposato would only have been entitled to recover the premiums paid to obtain a substitute life insurance policy. To resolve this issue, we must determine the specific nature of the "loss or damage" suffered by Ms. Sposato prior to her death where her employer would have provided a life insurance policy with a double indemnity provision but for her wrongful termination.

[4] California courts have not addressed the unusual issue presented by this case, and the legislative history of the survival statute does resolve the issue clearly. In 1949, California enacted a comprehensive survival statutes for personal tort and wrongful death actions. *See generally Sullivan v. Delta Air Lines, Inc.*, 15 Cal. 4th 288, 297-302 (1997). In an attempt to clarify and modernize the law with respect to the survivability of other causes of action, the California legislature revised the statutes in 1961, and again in 1992. *See id.*; 3 Witkin California Procedure § 67 (4th ed. 1996).

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[2]The provision reads, in its entirety,

> In an action or proceeding by a decedent's personal representative or successor in interest on the decedent's cause of action, the damages recoverable are limited to the loss or damage that the decedent sustained or incurred before death, including any penalties or punitive damages or exemplary damages that the decedent would have been entitled to recover had the decedent lived, and do not include damages for pain, suffering or disfigurement.

[5] As presently enacted, Section 377.34 provides that virtually all causes of action survive a decedent's death, but places several limitations on the damages recoverable from or by a decedent's estate. For example, damages for pain and suffering by a decedent are expressly excluded, as are other damages not "sustained or incurred [by the decedent] before death." Cal. Civ. Proc. Code § 377.34. However, surviving relatives of the decedent may bring a wrongful death action seeking "to recover pecuniary losses cause by the death, including pecuniary support the decedent would have provided them, and noneconomic damages for being deprived of the decedent's society and comfort." Cal. Civ. Proc. Code § 377.60; *Garcia v. Superior Court*, 42 Cal. App. 4th 177, 186-87 (Cal. Ct. App. 1996).

[6] Together, these statutory provisions preclude double recovery for the survivors of a decedent in cases where the decedent's injury is both the foundation of the decedent's cause of action in tort and the cause of the decedent's death, *Garcia*, 42 Cal. App. 4th at 186-87, and also preclude recovery of noneconomic damages deemed to be personal to the decedent, *Williamson v. Plant Insulation Co.*, 23 Cal. App. 4th 1406, 1417-18 (Cal. Ct. App. 1996). It appears that the California Legislature was focused primarily on these two issues when Probate Code § 573, an earlier version of the survival statute, was enacted in 1961. *See* 3 California Law Revision Commission Reports Recommendations and Studies, Section F at 21-23 (1960) (considering the limitation on damages such as pain and suffering, loss of future earnings and punitive damages); *see also Sullivan*, 15 Cal. 4th at 299 (referring to the report "as evidence of the Legislature's intent in adopting the provisions thus proposed."). The current version of the statute is essentially unchanged.

[7] Consistent with the apparent intent of the Legislature, California courts have interpreted Section 377.34 to prohibit an award of speculative, personal or noneconomic damages such as pain and suffering, emotional distress, and loss of

future earnings. *See Sullivan*, 15 Cal. 4th at 299 (quoting *Williamson*, 23 Cal. App. 4th at 1406); *Garcia*, 42 Cal. App. 4th at 186 ("Once deceased, the decedent cannot in any practical way be compensated for his injuries or pain and suffering.").

[8] We believe that the facts of this case put Ms. Sposato's loss outside the category of losses prohibited by California's survival statute. As a consequence of her unlawful termination, Ms. Sposato's employer wrongfully denied her a life insurance policy containing a double indemnity provision. This loss predated her death by several years. The benefit of the life insurance policy was never meant to inure to Ms. Sposato herself, but was always intended to benefit her family. The amount of the payout in the event of her untimely death was certain throughout the course of Ms. Sposato's dispute with her employer. Therefore, the damages sought by Ms. Sposato's estate are not speculative or personal to the decedent, nor did the loss suffered by the decedent occur after her death. Indeed, the parties stipulated that the insurance coverage was to have been part of the back pay to which she was entitled, within the context of the litigation that was pending when she died.

In light of the unusual factual circumstance of this case, we doubt that California courts would apply the survival statute so as to preclude the estate's recovery of the lost insurance benefit.

CONCLUSION

For the reasons set forth above, we reverse the judgment of the district court and remand with instructions to enter judgment in favor of Ms. Sposato's estate.

REVERSED AND REMANDED.

Appendix A

LEAVY, Judge, dissenting.

I respectfully dissent. First, neither California law nor federal law compels the result reached by the majority. We did not consider life insurance proceeds as a possible measure of damages in *Galindo v. Stoody*, 793 F.2d 1502, 1517 (9th Cir. 1986). The Fourth Circuit, which has directly considered this issue, has held that it is the life insurance premium, not the proceeds, which is the proper measure of damages in a wrongful termination suit. *See Fariss v. Lynchburg Foundry*, 769 F.2d 958, 965 (4th Cir. 1985).

Second, the majority misconstrues California's survival statute, Cal. Civ. Proc. Code § 377.34, which limits the damages recoverable by a decedent's personal representative "to the loss or damage that the decedent sustained or incurred before death." Under the plain language of section 377.34, Mr. Sposato is limited to the loss that Ms. Sposato suffered before her death, that is, the life insurance premiums.

Third, the result reached by the majority makes bad public policy. As a general rule, the discharge of an employee, even if wrongful, should not transform the employer into a life insurer. Unlike medical insurance, life insurance benefits not the employee, but his or her survivors, and may be obtained from various sources in amounts that are entirely within the employee's discretion. As a result of our holding, prudent employers may well cease to offer group life insurance as a benefit of employment. *See Fariss*, 769 F.2d at 965.

I would affirm the district court's well-reasoned opinion.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA DATED JULY 23, 1998 AND FILED JULY 27, 1998

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

No. C-92-3994 SC

STEPHEN A. SPOSATO as Administrator of the ESTATE OF JODY JONES SPOSATO,

Plaintiff,

v.

ELECTRONIC DATA SYSTEMS CORPORATION and DAVID WIRE,

Defendants.

ORDER RE DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

It appears to the Court that the parties have created a full record regarding the length of the period of the employer's backpay liability so as to satisfy the Ninth Circuit Court of Appeals. For the reasons contained in Judge Lynch's Order of October 10 1995, this Court hereby GRANTS defendants' motion for summary judgment and DENIES plaintiff's cross motion on the same issue.

Appendix B

IT IS SO ORDERED.

Dated: July 23, 1998.

By: s/ [illegible]
United States District Judge

APPENDIX C — MEMORANDUM AND JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DATED AND FILED APRIL 22, 1997

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 95-17225

D.C. No. CV-92-03994-EFL

STEPHEN A. SPOSATO, Administrator,
ESTATE OF JODY JONES SPOSATO, Deceased.

Plaintiff-Appellant,

v.

ELECTRONIC DATA SYSTEMS, CORP.,
DAVID WIRE,

Defendant-Appellee.

MEMORANDUM*

Appeal from the United States District Court
for the Northern District of California
Eugene F. Lynch, District Judge, Presiding.

Argued and Submitted February 12, 1997
San Francisco, California

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

Appendix C

Before: GOODWIN, LEAVY, THOMAS, Circuit Judges.

Jody Sposato sued her employer in the Superior Court for damages for wrongful discharge under California law. The cause was removed to the district court on the ground of diversity, and, while the case was pending, Jody Sposato was accidentally killed. Her husband was substituted as plaintiff. On cross motions for summary judgment, the court granted judgment for the employer. The estate appeals. We have jurisdiction under 28 U.S.C. § 1291, and we vacate and remand.

FACTS

Jody Sposato was a salesperson at Electronic Data Systems, Corp. ("EDS"), where her compensation included salary and fringe benefits. Her benefits included an employer financed life insurance policy having a face value of $150,000, and a double indemnity in case of the accidental death of the worker. Ms. Sposato quit her job on February 18, 1992, alleging sex discrimination. The parties apparently agree that her termination was a "constructive discharge" and that she had the right, within thirty-one days of leaving her employment, to convert her existing insurance to private coverage with the same carrier and without a physical examination.

For reasons not developed in the record, Ms. Sposato did not within the thirty-one days immediately after termination, replace her EDS insurance. She procured other insurance in August of 1992. Her replacement life insurance policy had a face value of $150,000, but did not include the

double indemnity for death by accident. On July 1, 1993, while attending her deposition in this case, she was killed. A joint statement of stipulated facts included the fact that Ms. Sposato did obtain new insurance and that the $150,000 face amount of that policy has been paid to her estate. It was also agreed, and the court found, that she had mitigated her damages by buying new insurance, and that she had complied with the state law's administrative requirements before bringing suit.

PROCEDURAL HISTORY

Counsel on both sides made commendable efforts to settle the case and through binding arbitration settled all other issues. In the settlement agreement, EDS granted some financial payment to the estate, the specific amount redacted as confidential. The settlement agreement does not explain the basis for the amount of payment agreed upon. The agreement provides that the "payment is specifically not intended to represent in any fashion past or future wages . . . or any alleged punitive damages."

After the settlement agreement, the parties sought resolution in district court of the last issue remaining, which they framed as whether the right of a wrongfully discharged employee to "backpay" pursuant to the California Fair Employment and Housing Act, California Government Code § 12900, *et seq.* ("FEHA") carries with it the right to the proceeds of the insurance policy that was in force at the time of discharge, or merely the premiums paid to keep it in force.

Appendix C

INTERPRETATION OF STATE LAW

When sitting in diversity cases we apply state substantive law as "declared by [the state's] Legislature in a statute or by its highest court." *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 78 (1938). "If there be no decision by [the state supreme] court then federal authorities must apply what they find to be the state law after giving 'proper regard' to relevant rulings of other courts of the State." *Commissioner v. Estate of Bosch*, 387 U.S. 456 (1967). In interpreting state law, this court may use such sources as "the relevant statutes, legislative history, treatises, restatements, and published opinions." *In re McLinn*, 739 F.2d 1395, 1400 (9th Cir. 1984) (en banc).

The California FEHA establishes that freedom from job discrimination on specified grounds is a civil right and that such discrimination is against public policy and an unlawful employment practice. *Commodore Home Sys., Inc. v. Superior Court of San Bernardino County*, 649 P.2d 912, 913 (Cal. 1982) (en banc). Under the FEHA, a court may offer any recognized judicial remedy to those who have been wrongfully discharged. *Id.* at 915-916. One such remedy is backpay. *Lowe v. California Resources Agency*, 2 Cal. Rptr. 2d 558, 560 n.3 (Cal. Ct. App. 1991); Cal. Code Regs. tit. 2, § 7286.9(a)(1). One part of backpay is fringe benefits. *County of Alameda v. Fair Employment & Housing Comm'n*, 200 Cal. Rptr. 381, 386 (Cal. Ct. App. 1984); 2 Cal. Code Regs. tit. 2 § 7286.9(a)(1)(B). One kind of fringe benefit is medical and life insurance benefits. § 7286.9(a)(1)(B).

Appendix C

Liability for backpay is ordinarily agreed upon or fixed by a judgment. In this case, no terminal date for backpay liability has been identified by agreement or judgment. Sposato's estate, however, is eligible for employer-paid life insurance benefits only for the period of time in which the employer is liable for backpay.

The most significant statement in the settlement agreement may be the following: "1. Plaintiff is entitled to the fringe benefit of life insurance as an element of back pay. Following the execution of this Release, the sole issue remaining to be adjudicated in the Action will be the issue of whether the proper measure of the value of the life insurance benefit is the cost of the premium or the sum equal to the proceeds of the EDS insurance policy that would have been in effect had Ms. Sposato died in an accident while employed by EDS ("the Life Insurance Issue").

The district court under the agreed submission of the case did not address whether the "settlement and general release" by the quoted language waived any designation of backpay, or the fixing of any period of potential liability for backpay. The record is silent on such important facts as the length of time, if any, for which the employer agreed to be liable for backpay, or, if there was no such agreement, then what length of time would have been reasonable, in the factual setting of this case. In order to determine what a California court might decide was due for "backpay" if this case had gone to trial, more facts are needed.

Unfortunately, for the purposes of this case, the settlement agreement drawn up after death is silent about

any agreement terminating the employer's duty to pay "backpay." In a trial, that duration of backpay exposure would have been decided by the trier of fact.

Because the abstract question of the employer's liability for insurance, proceeds or premiums, was presented to the trial court as a bipolar choice, with no factual content, we don't know whether the parties agreed upon a cut-off date for backpay, or assumed that it was none of the trial court's business. Now the defense wants this court to approve the trial court's judgment on stipulated fragments of facts, and the plaintiff wants this court to set it aside and grant the full relief sought. On this record, we can do neither.

Obviously, courts will take a long and careful look at some reasonable time limit on an employer's exposure to backpay. An unlimited, open ended liability from discharge to eternity will soon put a speedy end to employer enthusiasm for providing life insurance to their labor force. Because the parties permitted the trial court to address none of these concerns, we will not expand the discussion of what turned out to be a "put up" case.

In this case, because the parties did not reveal to the trial court, or at least did not include in the trial record, any evidence upon which this court could determine what length of time was agreed upon, if it was agreed upon, or what length of time was reasonable, if not agreed upon, for the employer's backpay liability to continue in this case, we have no choice but to remand for the trial court to make that determination.

Vacated and remanded. Each side will bear its own costs on appeal.

Appendix C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NO. 95-17225
CT/AG#: CV-92-03394-EFL

STEPHEN A. SPOSATO, as Administrator of the Estate of Jody Jones Sposato

Plaintiff – Appellant

v.

ELECTRONIC DATA SYSTEMS CORP; DAVID WIRE

Defendants – Appellees

APPEAL FROM the United States District Court for the Northern District of California (San Francisco).

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of California (San Francisco) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is VACATED AND REMANDED. Each side will bear its own costs on appeal.

Filed and entered April 22, 1997

APPENDIX D — ORDER AND JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA DATED OCTOBER 9, 1995 AND FILED OCTOBER 10, 1995

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

No. C-92-3994 EFL

JODY JONES SPOSATO,

Plaintiff,

vs.

ELECTRONIC DATA SYSTEMS CORP., et al.,

Defendants.

ORDER

I. INTRODUCTION

Jody Sposato filed this action in state court on August 31, 1992, alleging sex discrimination and constructive termination by her employer, Electronic Data System ("EDS") and David Wire, her supervisor. The action was removed to federal court on October 1, 1992. Ms. Sposato is now deceased, and her husband, Steven Sposato, was substituted as plaintiff.[1] The parties filed cross-motions for

1. "Plaintiff" will be used to refer to both Mr. and Ms. Sposato, and for the sake of consistency, the Court will employ the feminine pronoun when referring to plaintiff.

summary judgment. Prior to the hearing, the parties settled many of the issues in this case with the assistance of Judge Norman Spellberg, leaving only one issue for decision. The remaining issue is whether plaintiff may recover the proceeds of a double-indemnity life insurance policy, maintained by EDS during Ms. Sposato's employment, as an element of back pay incident to her California Fair Employment and Housing Act ("FEHA") discrimination claim.

Plaintiff asserts that she is entitled to $300,000 in insurance proceeds, while defendants argue that she is entitled only to the value of the premiums she paid to purchase substitute coverage.

On December 3, 1994, the Court heard oral argument on this issue, and orally ruled that plaintiff was obligated to reasonably mitigate her damages regarding double indemnity, and that the determination of whether or not she had done so was a question of fact for the trier of fact. On March 6, 1995, the Court issued an order to that effect.

On January 27, 1995, Judge Spellberg issued an amended arbitration award holding that the issue of mitigation had been settled by the Settlement Agreement between the parties. On April 28, 1995, the parties filed cross-motions regarding that award. Plaintiff filed her "Motion To Enforce Settlement Agreement Or To Confirm Arbitration Award," while defendants filed their "Motion To Vacate Forced 'Stipulation.' " The Court heard oral argument on May 26, 1995.

Appendix D

II. BACKGROUND

A. *Life Insurance Policy*

Ms. Sposato was employed by EDS from late 1990 through February 18, 1992. During her employment, she was covered by a group life insurance policy which insured her life during her employment in an amount twice what she earned in base salary and bonuses. The policy was a "double indemnity" policy, in which the insurer pays out twice the face value of the policy if the insured dies accidentally. The face value of Ms. Sposato's policy was $150,000, and $300,000 if her death were accidental. EDS paid premiums of $360 per year.

Following her separation from EDS, Ms. Sposato had a right to, within 31 days, convert the group insurance policy to an individual policy. EDS did not inform her of this right, and she did not exercise it. Ms. Sposato did not initially purchase life insurance because of concerns relating to her pregnancy, but eventually purchased a policy with a face value of $150,000. The policy did not contain a double indemnity clause. The premium on the policy was $207 per year.

B. *Settlement*

Following several days of mediation of this case, the parties reached a July 1994 partial settlement agreement under which plaintiff was to receive certain elements of back pay, including the benefit of life insurance. However, the parties disagreed, and continue to disagree, about the proper

measure of this benefit. After this Court found that the question of whether plaintiff had mitigated was a question of fact, and pursuant to the terms of the Settlement Agreement, the parties submitted the issue of whether plaintiff had mitigated to final and binding arbitration before Judge Norman Spellberg.

In his Amended Arbitration Award of January 27, 1995, Judge Spellberg held that "the factual issue of Ms. Sposato's mitigation of damages was, in every aspect whatsoever, settled by the Settlement Agreement" between the parties. The Arbitration Award ordered that the parties stipulate to the settlement of the mitigation issue in this proceeding, and ordered defendants not to present any evidence in this proceeding that Ms. Sposato failed to mitigate her damages. Defendants requested reconsideration, and on February 13, 1995, Judge Spellberg denied that request.

The parties filed simultaneous motions regarding this award. Plaintiff seeks to enforce the Settlement Agreement or alternatively to enforce the final arbitration award; defendants seek to vacate the award.

III. DISCUSSION

A. *Arbitration Award*

The Settlement Agreement entered into by the parties provides: "If any dispute arises as to the meaning of this agreement, or as to any party's compliance with its terms, the parties shall submit the dispute to final and binding arbitration." It further provides that the Agreement is to be construed and enforced pursuant to California law.

Appendix D

California Code of Civil Procedure § 1286.2(d) provides that a court shall vacate an arbitration award if "[t]he arbitrators exceeded their powers and the award cannot be corrected without affecting the merits of the decision upon the controversy submitted." Defendants contend that the arbitrator exceeded his power by changing, rather than interpreting, the meaning of the Settlement Agreement. They argue that he ordered the parties to stipulate to a legal conclusion that is inconsistent with the rest of the settlement agreement, and that he exceeded the scope of his authority. They further argue that the defendants are prejudiced by the arbitration agreement.

Pursuant to California law, the scope of arbitration is a matter of agreement between the parties. *Moncharsh v. Heily & Blase*, 3 Cal. 4th 1, 8 (1992). Here, the parties have agreed to final and binding arbitration as to the meaning of the Settlement Agreement. "[A]n arbitrator's decision is not generally reviewable for errors of fact or law, whether or not such error appears on the face of the award and causes substantial injustices to the parties." *Id.* at 6. Moreover, an arbitrator does not exceed his powers by reaching an erroneous decision. *Id.* at 28. As the California Supreme Court has held, "in the absence of more specific restrictions in the arbitration agreement, the submission or the rules of arbitration, the remedy an arbitrator fashions does not exceed his or her powers if it bears a rational relationship to the underlying contract as interpreted, expressly or impliedly, by the arbitrator." *Advanced Micro Devices, Inc. v. Intel Corp.*, 9 Cal. 4th 362, 367 (1994). The Court finds that the arbitrator did not exceed his powers when he decided the question put to him; namely, whether the parties had settled

the factual issue of mitigation. The Settlement Agreement called on the arbitrator to arbitrate the meaning of the Agreement, and in determining that the Agreement meant that the parties had settled the factual issue of mitigation, the arbitrator was arbitrating the meaning of the Agreement. The fact that defendants disagree strenuously with the decision of the arbitrator, or even the fact that defendants believe that this decision is not consistent with the actions of the parties, does not demonstrate that Judge Spellberg exceeded his authority. The arbitrator's decision that the parties had resolved the factual question of mitigation was rationally related to the Settlement Agreement. It is not the Court's prerogative to review the arbitrator's decision, however incorrect it may be. Accordingly, the defendants' motion to vacate is DENIED.

Plaintiff asks the Court to enforce the Settlement Agreement and to affirm the arbitration award. The Court GRANTS the motion to affirm the arbitration award, including the order that the parties stipulate as to the settlement of the mitigation issue. *See, e.g., Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 32 (1991) (finding that arbitrators have the power to fashion equitable relief); *Advanced Micro Devices*, 9 Cal. 4th at 374-75 (holding that arbitrators have broad discretion to fashion remedies).

D. *Summary Judgment*

Summary judgment is appropriate where no genuine issue exists as to any material fact and where the moving party is entitled to judgment as a matter of law. Fed. R. Civ.

P. 56(c). Because the parties have settled the factual issue of whether Ms. Sposato mitigated her damages, there is no disputed issue of material fact. The parties have agreed that plaintiff is entitled to some form of life insurance benefits. The Court now turns to the question of whether, as a matter of law, plaintiff is entitled to the proceeds of the life insurance policy, or whether she is limited to damages in the form of premiums, all in light of having fully mitigated her damages.

There is scant authority on this question. Plaintiff cites decisions of the California Department of Fair Employment and Housing ("DFEH") for the proposition that the purpose of FEHA, like the purpose of Title VII, is to make whole persons who have been discriminated against. *DFEH v. Rayne Water Conditioning*, FEHC Dec. No. 84-01, p. 16 (1984). Under DFEH decisions, an employee may recover as back pay benefits which would have been paid by insurance had the employee not been discriminatorily discharged. *See, e.g., DFEH v. Madera County*, FEHC Dec. No. 90-03, p. 39 (1990); *DFEH v. California State University Sacramento*, FEHC Dec. No. 88-08 at pp. 25-26 (1988); *DFEH v. Northrop Services*, FEHC Dec. No. 93-11 at p. 13.

Plaintiff also cites *Custom Coated Products*, 245 NLRB 33, 33 (1979), in which the NLRB held that "[w]here the discriminatee dies, as here, his estate is entitled to receive a sum of money equivalent to the amount of bonuses, emoluments, insurance or other death benefits which the estate would have received had the discriminatee been employed by the employer at the time of his death." Because the DFEH has adopted the broad, make whole approach of *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 421 (1975),

and because *Albemarle* adopted the broad, make whole approach of the NLRB, plaintiff argues that this Court should follow the decisions of the NLRB and the DFEH, and should, in the liberal, make whole spirit of FEHA, award the proceeds of the insurance policy.

Neither the Ninth Circuit, nor any California court has squarely addressed this issue. The only Ninth Circuit authority that comes close is *Galindo v. Stoody Co.*, 793 F.2d 1502 (9th Cir. 1986). In that case, the Ninth Circuit discussed the proper measure of damages in an unfair representation suit in which a union member sued, inter alia, his union. The *Galindo* court held that a union is liable for compensatory damages resulting from the union's conduct, and that such damages include fringe benefits. *Id.* at 1517. The Court held "[w]here an employee's fringe benefits include medical and life insurance, a plaintiff should be compensated for the loss of those benefits if the plaintiff has purchased substitute insurance coverage or has incurred, uninsured, out-of-pocket medical expenses for which he or she would have been reimbursed under the employer's insurance plan." *Id.* The Ninth Circuit remanded so that the district court could determine "the amount of any actual expenses incurred by Galindo as a result of lost medical and life insurance benefits." *Id. See also, EEOC v. Farmer Bros. Co.*, 31 F.3d 891, 902 (9th Cir. 1994) (following *Galindo*).

Plaintiff argues that because *Galindo* permits a plaintiff to be compensated for uninsured medical expenses which would have been reimbursed by the employer's insurance but for the unlawful termination, it should equally permit compensation for the loss of double indemnity proceeds.

However, while *Galindo* specifically refers to compensation for lost premiums for both medical and life insurance, and to reimbursement "incurred, uninsured, out-of-pocket *medical* expenses," *Galindo*, 793 F.2d at 1517, (emphasis added), the Ninth Circuit expressly did not refer to life insurance proceeds. Notably, the Ninth Circuit was not faced with the question presented here.

The only appellate court to have been presented with this question is the Fourth Circuit in *Fariss v. Lynchburg Foundry*, 769 F.2d 958 (4th Cir. 1985). Although *Fariss* was an age discrimination suit brought pursuant to the ADEA rather than the California FEHA or Title VII, its discussion is instructive. In *Fariss*, as in the case at bar, plaintiff Fariss died during the pendency of his discrimination suit, and his spouse was substituted as plaintiff. Mrs. Fariss sought the proceeds of the life insurance policy that would have covered Fariss had he not been discriminatorily discharged. The Fourth Circuit held that she was entitled only to the value of the premiums paid by the employer. *Id.* at 965. The *Fariss* court further held that plaintiff "[w]here the employee elects to obtain substitute insurance, the 'make whole concept' underlying ADEA damages would permit full recovery of any additional premiums for the comparable individual policy beyond what the employer would have paid for group insurance." *Id.* at 966. Additionally, the Fourth Circuit held that a discharged employee has a duty to mitigate by purchasing substitute insurance "if he wishes to claim any damages for loss of coverage above the employer-paid premiums." *Id.* The *Fariss* court specifically held that a plaintiff was not entitled to the proceeds of an insurance policy, holding, "[w]e do not think Congress intended, as a

general rule, to transform employers into insurers merely because an insurance policy is part of the compensation for employment." *Id.* at 965.

Plaintiff argues that *Fariss* does not apply first because the case at bar is governed by state law, and not federal law, and second, because its holding that only premiums, and not proceeds, are recoverable is anomalous and inconsistent with the make whole nature of remedies in discrimination cases.

The Court first addresses plaintiff's argument that because this case, unlike *Fariss*, is based on state law, *Fariss* does not apply. California courts have repeatedly relied on federal anti-discrimination law in interpreting FEHA. *See, e.g., University of S. Cal. v. Superior Court*, 222 Cal. App. 3d 1028, 1035 (1990) (evaluating FEHA claim under Title VII law); *City and County of San Francisco v. Fair Employment and Housing Com.*, 191 Cal. App. 3d 976, 985 (1987) (holding that the objectives and purposes of FEHA are identical). Thus, in the absence of any decision on this issue by a California court, the fact that *Fariss* is a federal court decision is not determinative.

Secondly, the Court turns to plaintiff's argument that *Fariss* is anomalous. A review of the relevant authority makes clear that the decision is not anomalous. While few district courts and no other circuit court has addressed the issue of the proper valuation of life insurance benefits when a plaintiff has died, numerous district courts have cited and followed *Fariss*.

For instance, in *Worsowicz v. Nashua Corp.*, 612 F. Supp. 310 (D.N.H. 1985), the district court found *Fariss* persuasive in determining the appropriate measure of damages in a case presenting similar facts to those in *Fariss* as well as those presented here. In *Worsowicz*, plaintiff's claim arose out of her deceased husband's termination. The court held that the plaintiff was entitled only to the value of the premiums, and not to the proceeds of the life insurance policy. *Id.* at 313.

A number of other district courts have likewise followed *Fariss*. In *Bonura v. Chase Manhattan Bank, N.A.*, 629 F. Supp. 353, 360 (S.D.N.Y. 1986), one of the plaintiffs died while his discrimination action was pending. The court followed *Fariss* in holding not only that plaintiff was not entitled to the proceeds of the policy, but also that he was not entitled to the value of the premiums because he had failed to mitigate his damages. *See also*, *Jones v. Kayser-Roth Hosiery, Inc.*, 748 F. Supp. 1276 (E.D. Tenn. 1990) (following *Fariss* in holding that the value of employee benefits is the premiums paid by the employer); *Munnelly v. Memorial Sloan Kettering Cancer Center*, 741 F. Supp. 60, 63 (S.D.N.Y. 1990) (adopting *Fariss* analysis and holding that a successful plaintiff "may recover for the cost of a life insurance package comparable to that which he received through his previous employer, even if he does not actually procure such comparable insurance, provided that he makes diligent efforts to do so."); *Cooper v. Cobe Laboratories*, 743 F. Supp. 1422, 1435 (D. Colo. 1990) (following *Fariss* in holding that plaintiff "is entitled to recover for the loss of her medical insurance benefits, with the measure of that loss based on the out-of-pocket expense to [plaintiff] for the

continuing payment of premiums."); *Buckley v. Reynolds Metals Co.*, 690 F. Supp. 211, 219 (S.D.N.Y. 1988) (citing *Fariss* for the proposition that "[t]he measure of damages is the amount paid by the employer in premiums."). Additionally, Professor Larson has stated: "Most courts have also permitted any disability benefits accruing to the plaintiff to be included in his back pay award, as well as reimbursement for any health, life, or other insurance premiums which the employer would have paid but for the employee's discharge." 3A Arthur Larson, *Employment Discrimination* § 103.41(b).

In *Fariss*, the court held that it did not need to "consider the measure of damages had [plaintiff] earnestly attempted to procure substitute individual coverage and found insurance unavailable for a person of his age and health." *Fariss*, 769 F.2d at 966. The district court in *Foster v. Excelsior Springs City Hospital and Convalescent Center*, 631 F. Supp. 174 (W.D. Mo. 1986) was faced with precisely that question, and held that proceeds, rather than premiums, were the appropriate remedy. In *Foster*, plaintiff Guy Foster sued his employer alleging a violation of ADEA. Because of his medical history, procuring substitute life insurance was prohibitively expensive. After he died, his widow became the substitute plaintiff. The *Foster* court accepted the *Fariss* rule that "in most cases, the employee can easily avoid the risk of being uninsured by purchasing an individual policy of comparable value," *Fariss*, 769 F.2d at 965-66, but held that plaintiff Foster presented the exception to the rule because he was uninsurable. The Court held that the "make-whole" nature of the ADEA "requires a remedy which puts the employee in the position he would have been had

there been no discrimination." *Foster*, 631 F. Supp. at 175. The court held "when employed [plaintiff] had the expectation and security of knowing his spouse would be financially taken care of through his life insurance." *Id.* Based on this analysis, the court held that "it is the proceeds, not the premiums, that can make him whole in retrospect." *Id.*

The Court finds that the decision in *Fariss* is persuasive here, and that plaintiff is not entitled to the proceeds of the double indemnity life insurance policy. As the *Fariss* court noted, the policy behind the remedies in a discrimination case is to make whole the employee. The question then is what will make an employee who has lost insurance coverage whole. *Fariss* held that the benefit lost when an employee is terminated is insurance *coverage*, i.e., being insured. "This insurance coverage, not the proceeds, is the benefit for which the employer must be held liable. . . . The value of being insured for a given period is precisely the amount of the premiums paid." Similarly, the court in *Worsowicz* held that "the pecuniary benefit derived by plaintiff from [defendant's] provision of life insurance coverage is the amount of money plaintiff saved by not having to purchase life insurance coverage. In order, therefore, to make plaintiff whole and restore this lost pecuniary benefit, Nashua should only be obligated to the extent of the value of the life insurance premiums." *Worsowicz*, 612 F. Supp. at 313. The Court finds this analysis is correct, and will follow it here. An employer who has discriminated against an employee must make that employee whole by providing the salary and benefits it would have been obligated to provide if not for its discrimination. If plaintiff were not terminated, her employer would have been obligated to pay her insurance premiums. However, it

would never have been required to pay the value of her life insurance policy. *Fariss*, at 965.

Fariss also noted that a rule requiring employers to be liable for the proceeds of insurance policies would act as a disincentive to providing insurance as a fringe benefit by exposing employers to "such enormous potential liability." *Fariss*, at 965. The Court is persuaded by this reasoning.

Additionally, the Court finds that the analysis in *Foster* does not apply here. Unlike the plaintiff in *Foster*, plaintiff here was not uninsurable. Indeed, she mitigated her damages by procuring substitute, albeit more narrow, coverage. Thus, she does not fit within the exception anticipated in *Fariss*, and addressed in *Foster*. Instead, she is entitled to the premiums.

IV. CONCLUSION

For the foregoing reasons and for good cause shown, IT IS HEREBY ORDERED that defendants' motion for summary judgment on the issue of whether plaintiff is entitled to life insurance proceeds is GRANTED and plaintiff's motion for summary judgment on the same issue is DENIED.

The Clerk of the Court is directed to close this case.

IT IS SO ORDERED.

DATED: Oct 9, 1995.

s/ Eugene F. Lynch
EUGENE F. LYNCH
United States District Judge

Appendix D

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

No. C-92-3994 EFL

JODY JONES SPOSATO,

Plaintiff,

vs.

ELECTRONIC DATA SYSTEMS CORP., et al.,

Defendants.

JUDGMENT

Pursuant to the Order of today's date granting defendants' motion for summary judgment, the Court hereby enters judgment in favor of the defendants in this action.

IT IS SO ORDERED.

DATED: Oct 9, 1995.

s/ Eugene F. Lynch
EUGENE F. LYNCH
United States District Judge

APPENDIX E — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DENYING PETITION FOR REHEARING DATED AND FILED OCTOBER 7, 1999

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 98-16573

D.C. No. CV-92-03994-SC

STEPHEN A. SPOSATO, Administrator,
ESTATE OF JODY JONES SPOSATO,

Plaintiff-Appellant,

v.

ELECTRONIC DATA SYSTEMS, CORP.,
DAVID WIRE,

Defendants-Appellees.

Order

Before: GOODWIN, LEAVY, and THOMAS, Circuit Judges.

The panel has voted to deny the petition for rehearing. Judge Leavy voted to grant the petition for rehearing. Judge Thomas has voted to deny the petition for rehearing en banc and Judge Goodwin recommended denial. Judge Leavy recommends granting the petition for rehearing en banc.

Appendix E

The full court has been advised of the petition for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is DENIED and the petition for rehearing en banc is DENIED.